

MEMORANDUM OF LAW

DATE: November 10, 1994

TO: Councilmember Christine Kehoe

FROM: City Attorney

SUBJECT: Drawing for Downpayment Prize at the City Heights Park and Recreation Field

By memorandum of October 18, 1994, you requested an opinion on whether the structure of drawing for a \$5,000 prize constituted a lottery. Succinctly stated, you are sponsoring a Mid-City Community Homebuyers' Fair in which a drawing would be conducted and the \$5,000 prize money, amassed from contributions by various organizations, would be credited to an individual as the downpayment or portion thereof on a home in the Third District. Your representative, Tess Colby, has provided us with a copy of the rules (attached). The rules provide that anyone can participate in the drawing but first must visit one of the lenders or loan counsellors at the Homebuyers' Fair to ensure qualification for a loan, but no purchase at all is required to enter the contest.

Based on the foregoing, we do not believe that such a drawing is prohibited by California's restrictions on lotteries. Our analysis and supporting authorities follow.

California has prohibited lotteries since its inception as a state. Article IV, section 27 of the California Constitution of 1849. The definition of this prohibition is found in the California Penal Code at section 319:

LOTTERY DEFINED. A lottery is any scheme for the disposal or distribution of property by chance, among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property or a portion of it, or for any share or any interest in such property, upon any agreement, understanding, or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift-enterprise, or by whatever name the same may be known.

This seemingly simple definition of what is prohibited is made complex by the minds of men whose "ingenuity evolves some scheme within the mischief discussed" Cal. Gas. Retailers v. Regal Petroleum Corp., 50 Cal. 2d 844, 859 (1958). As defined, a lottery has three essential elements: (1) a prize; (2) distribution by chance; and (3) consideration.

We need not dwell on the first two elements, for clearly there is a prize of \$5,000 and the prize is distributed by a chance drawing. It is of no consequence that the recipient doesn't have physical control over the prize since it is transferred from one account to another. The word "property" in the definition is used without qualification. Hence we have no doubt that since the account transferred is for the direct benefit of the recipient, there is "property" received. People v. Settles, 29 Cal. App. 2d 781, 786 (1938).

While the elements of both "chance" and "property" are present in this drawing, we believe the last element of "consideration" is lacking. The Supreme Court has instructed that the element of consideration must be determined from the standpoint of the potential recipients of the property and not from the standpoint of those conducting the event. Cal. Gas. Retailers, id., at 860. As expressly provided in the attached rules, absolutely no purchase or payment is required from the recipients of the tickets to be drawn. Thus the fact that the business of the lenders or loan counsellors at the Fair may be enhanced does not provide the necessary consideration, and the mere fact that the potential recipient must go to the Fair and participate in a prequalification program cannot be equated to the necessary consideration.

In view of our statute (Pen. Code Section 319) defining a lottery and which provides that the consideration necessary is a "valuable one" paid, or promised to be paid by the one receiving the ticket, the fact that a ticket holder must go to the place of business of the sponsor of the scheme to deposit the ticket stub cannot be considered the necessary consideration.

Cal. Gas. Retailers, id., at 861-862.

Inasmuch as the critical element of consideration is lacking from your proposed drawing at the Homebuyers' Fair, we have no hesitancy in advising that your proposal as outlined in the rules does not constitute a lottery.

JOHN W. WITT, City Attorney

By

Ted Bromfield

Chief Deputy City Attorney

TB:mb:503.2(x043.2)

Attachment:1

cc Joseph M. Battaglino

Police Legal Advisor

ML-94-89